

PROCEDURAL RECOMMENDATIONS OF THE COMMISSION ON GOVERNMENT SECURITY

BY ROGER ROBB*

I

The Commission on Government Security has proposed a system of procedural machinery for cases under the Federal Civilian Loyalty Program. This article will attempt to evaluate the Commission's recommendations, in the light of experience under the Federal Civilian Loyalty Program.¹ Before undertaking that task, however, a brief review of the history of the Civilian Loyalty Program should be made, so that the Commission's report may be examined in context.

II

Prior to 1939, the removal or suspension, without pay, of employees in the classified Federal Civil Service was governed by the Lloyd-LaFollette Act of 1912, as amended.² That Act authorizes the removal or suspension, without pay, of persons in the classified Civil Service "for such cause as will promote the efficiency of such service and for reasons given in writing." The Act provides for service of written charges upon the employee, and an opportunity for him to file a written answer. A written decision on the answer is required. The Act specifically provides that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." Under the rules of the Civil Service Commission³ there is a right of appeal to the Commission but the Commission may set aside a removal only upon the ground that the required procedures have not been followed, or that the removal was made for political or religious reasons. In other words, there is no appeal on the merits.

Under Section 14 of the Veterans' Preference Act of 1944, as amended,⁴ applicable to the classified and nonclassified service, certain procedural benefits are granted to veterans who have completed their probationary or trial periods of employment, which are not available to

*Of the District of Columbia Bar.

¹ The Commission has also made procedural recommendations with respect to the programs for military personnel, document classification, atomic energy, industrial security, port security, national organizations, passport security, civil air transport security, and immigration and nationality. Discussion of the details of these recommendations would unduly prolong this article. In any event, the Federal Civilian Loyalty Program is the basis of all others, and this article will therefore be confined to a discussion of this program.

² 5 U.S.C. §652 (1952).

³ FEDERAL PERSONAL MANUAL, as amended January 23, 1955, §9.106.

⁴ 5 U.S.C. §863 (1952).

non-veterans under the Lloyd-LaFollette Act. Thus, a veteran is entitled to a written notice of charges at least thirty days in advance of proposed suspension or removal, and to answer the charges "personally and in writing." The Act also provides for an appeal and personal appearance before the Civil Service Commission, and on the appeal both procedural and substantive matters are reviewed. Finally, the decision of the Commission is made mandatory on the employing department or agency.

The Federal Loyalty Program had its origin in the Hatch Act of 1939. Section 9A of that Act⁵ makes it unlawful for any federal employee "to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." The Act further provides that any person violating this provision should "be immediately removed from the position or office held by him."

On March 21, 1947, President Truman issued Executive Order 9835,⁶ prescribing procedures for the employee loyalty program. The Executive Order made the head of each department or agency personally responsible for the administration of the program. The Order provided for the appointment of boards by each department or agency to hear loyalty cases and make recommendations with respect to removals. An employee charged with disloyalty was given a right to a written statement of the charges, the right to appear personally before the Board with counsel, and to present evidence on his own behalf, through witnesses or by affidavit. In connection with the statement of charges, the Order provided that they should "be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit."⁷ A recommendation of removal by a security board was subject to appeal to the head of a department or agency and thereafter to a Loyalty Review Board of the Civil Service Commission, "for an advisory recommendation."⁸ All proceedings before the departmental boards were under regulations prescribed by the department heads.

On August 26, 1950, Congress enacted Public Law 733⁹ authorizing the heads of certain specified departments and agencies in their "absolute discretion" to suspend, without pay, and to terminate employment "when deemed necessary in the interest of national security." Under the statute, "to the extent that such agency head determines that the interests of the national security permit," the employee concerned is entitled to a statement of the reasons for suspension, and an opportunity

⁵ Act of August 2, 1939, 52 STAT. 1148, 5 U.S.C. §118J (1952).

⁶ 12 FED. REG. 1935 (1947).

⁷ Exec. Order No. 9835, Part II, §2b.

⁸ *Id.*, §3.

⁹ 5 U.S.C. §22-1 (1952).

to reply. Before his employment is terminated, he is entitled to a written statement of the charges against him, an opportunity to answer, a hearing by a duly constituted agency authority, a review of his case by the agency head, and a written statement of the decision of the agency head. The decision of the agency head is final. Public Law 733 eliminated any appeal to the Civil Service Commission in security cases, under either the Lloyd-LaFollette Act or the Veterans' Preference Act.

On April 29, 1953, President Eisenhower issued Executive Order 10450¹⁰ revoking Executive Order 9835 and abolishing the Civil Service Loyalty Review Board.¹¹ The Order provided that all departments and agencies of the government should thereafter be subject to the provisions of Public Law 733, and directed that the head of a department or agency should immediately suspend any employee if he deemed such suspension necessary in the interests of national security.¹²

III

From what has been said it will be seen that within the past twenty years a system of loyalty-security jurisprudence has evolved through statutory enactments, executive orders, and departmental rules and regulations. While recognizing that a loyalty-security case is an administrative proceeding and not a trial, an attempt has been made to afford the individuals involved certain procedural safeguards. In this respect we have come a long way from the summary procedures contemplated by the Lloyd-LaFollette Act, under which an employee could be dismissed without a hearing or an appeal on the merits. The rationale has been, as expressed by Mr. Justice Harlan in *Cole v. Young*,¹³ that "in view of the stigma attached to persons dismissed on loyalty grounds the need for procedural safeguards seems even greater than in other cases." As the Commission on Government Security found, however, certain weaknesses have appeared in the procedural machinery. These weaknesses the Commission proposes to correct.

In the first place the Commission recommends that in the case of Civil Service employees, the security-loyalty procedures should be invoked only when the evidence tends to indicate reasonable doubt of loyalty.¹⁴ All other cases should be dealt with under normal Civil Service or related procedures, that is, the machinery of the Lloyd-LaFollette Act and the Regulations of the Civil Service Commission. Under these procedures, as we have seen, an employee may be removed "for such cause as will improve the efficiency of the service" without a hearing or appeal on the

¹⁰ 18 FED. REG. 2489 (1953).

¹¹ Regional loyalty boards set up by the Civil Service Commission were also abolished.

¹² Exec. Order No. 10450, §§1, 6.

¹³ 351 U.S. 536, 546 (1956).

¹⁴ REPORT OF THE COMMISSION ON GOVERNMENT SECURITY, 81-89 (1957).

merits. The Commission accepts the validity of the premise that it is more disgraceful to be dismissed on loyalty grounds than to be removed under Civil Service Regulations for "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" which does not involve disloyalty.¹⁵ Perhaps it might be argued that the distinction is illogical, that the matter is one of degree, and that an employee is entitled to the same procedural safeguards, whether he is accused of stealing money from the till or charged with being a security risk upon the ground that there is reasonable doubt as to his loyalty. Since 1912, however, the Federal Civil Service has lived and functioned under the Lloyd-LaFollette Act without substantial complaint as to the procedural fairness of the Act. It cannot be doubted moreover that the Commission's proposal would insulate from any stigma of disloyalty those employees who are removed for the more orthodox reasons, commonly referred to as "suitability grounds." Furthermore, the Commission finds that "since the beginning of the current security program established by Executive Order 10450, the vast majority of so-called 'security removals' have in fact been suitability removals, handled under normal civil service or related procedures." There seems to be no reason why this practice should not be continued.

In connection with removals under the suitability or Civil Service procedures, the Commission recommends the repeal of those provisions of the Veterans' Preference Act¹⁶ which accord to veterans a right of appeal to the Civil Service Commission on the merits from an order of dismissal under the Lloyd-LaFollette Act. Noting that under the Veterans' Preference Act, the decision of the Civil Service Commission on such an appeal is made mandatory on the employing department or agency, the Commission on Government Security takes the position that in the interest of sound personnel management practice the authority to remove or suspend employees should rest with the employing agency, and not with any independent appellate body. The Commission also bases its recommendation upon the ground that there should be equality of treatment for all employees, whether veterans or not.

For the handling of loyalty cases, the Commission recommends a major change in the existing machinery. Under the Commission's recommendation, there would be a Central Security Office in the Executive Branch independent of any existing department or agency. The director of the Central Security Office would be appointed by the President with the advice and consent of the Senate. The director in turn would appoint hearing examiners who would be full-time government employees, chosen from the Civil Service Register. Such examiners

¹⁵ See *Civil Service Suitability Regulations*, FEDERAL PERSONNEL MANUAL, as amended January 23, 1955.

¹⁶ 5 U.S.C. §863 (1952).

would conduct hearings on letters of charges in loyalty cases, in accordance with rules and regulations promulgated by the director of the Central Security Office. The opinions of the hearing examiners would be advisory to the heads of the employing agency. An adverse decision by an agency head, however, would be appealable to a Central Review Board in Washington, whose members would be appointed by the President with the advice and consent of the Senate. Opinions of the Central Review Board would likewise be advisory only to a head of an agency. The Board would confine its review to the record, without taking new evidence.¹⁷

The proposal for a Central Security Office is perhaps the most controversial of the Commission's recommendations. On the one hand it is said that such an office would bring about uniformity in rules and regulations and that the decisions of specially trained and experienced full-time examiners, acting independently of the agency involved, would be more likely to reflect wisdom and justice than the decisions of part-time boards, lacking in experience and training. On the other hand, it is argued¹⁸ that the creation of a Central Security Office would result in the pyramiding of administrative devices, the superimposing of agency upon agency, and a tangle of complex administrative machinery.

Co-ordination between the loyalty programs of various agencies, uniformity of rules and regulations, and consistency in decisions are obviously necessary. Unco-ordinated programs produce such absurd results as the case of Wolf I. Ladejinsky who was in turn cleared, denied clearance, and cleared by three different agencies.¹⁹ Whether a new bureau or agency is necessary to achieve such co-ordination is debatable. It may be noted that in 1955 and 1956 a "Personnel Security Advisory Committee," composed of representatives of various agencies and departments and functioning under the authority of the Cabinet, worked effectively to bring about uniformity and co-ordination.²⁰ This Committee was informal and advisory only. The effectiveness of its work, however, suggests that co-ordination and uniformity of programs and procedures might well be achieved, without the creation of a new bureaucracy, by a co-ordinator or director in the Executive Office of the President, with authority to make and enforce decisions.

Perhaps some will question the conclusion of the Commission that full-time hearing examiners would be preferable to agency boards. The Commission points out that hearings at present are held by boards of three members, drawn from agencies other than the employing agency, and picked from a panel of over 1800 employees available for such service. This panel is maintained by the Civil Service Commission. As

¹⁷ REPORT, 89-95.

¹⁸ See Dissent of Commissioner McGranery, REPORT, 798-805.

¹⁹ REPORT, 75.

²⁰ See REPORT, 75, 33-35.

the Commission on Government Security says "There are no full-time hearing officers and neither training nor experience is required."²¹ It may be suggested, however, that special training and experience, which full-time examiners unquestionably would have, would not guarantee infallibility or even superior wisdom in a finder of the facts. On the contrary, it is the theory of our jury system—and its soundness has been confirmed by centuries of experience—that on a question of fact, and by and large, the judgment of twelve ordinary men is more to be trusted than the finding of a judicial expert. The same theory might be applied to loyalty cases, in which agency boards fulfill the functions of juries. It might well be that any lack of training and experience on the part of a board could be counteracted by the appointment of trained counsel, to serve as a non-voting member of the board and guide the board in its work. This is the practice which has been adopted by the Atomic Energy Commission.²²

There can be no quarrel with the Commission's recommendation for more careful screening of derogatory information relating to loyalty, before a letter of charges is filed. In this connection, the Commission recommends that it be mandatory that employees be given an interview and an opportunity to explain any derogatory information that has been developed. Under existing practice, there is no such requirement. Experience has shown, however, that if an interview were granted in every instance, many loyalty cases might be resolved without the necessity of charges or a hearing; that information which appears derogatory on its face can often be satisfactorily explained by an employee in an informal interview.²³

In the interest of fairness to the employee, the Commission also recommends the abolition of the requirement under Public Law 733²⁴ that an employee under charges be suspended without pay pending a hearing. As an alternative, the Commission suggests the transfer of such an employee to another position not involving the national security, or if no such position is available, suspension of the employee with pay. This suspension would continue until the decision of the agency head to remove the employee from office, at which time the employee's pay would cease pending his appeal to the Central Review Board and the final decision of the agency head.²⁵ As a practical matter, it would seem that this recommendation is sound. More often than not, a government employee is wholly dependent upon his pay check; and to require him to defend himself in a hearing while at the same time depriving

²¹ REPORT, 93.

²² 10 C.F.R. §§26, 27 (1949). (AEC Criteria and Procedures for Determining Eligibility for Security Clearance).

²³ REPORT, 57-59.

²⁴ 5 U.S.C. §22 (1952).

²⁵ REPORT, 59-61.

him of his ability to live and finance his defense seems unnecessarily harsh. Incidentally, it may be noted that the Commission recommends that in all cases the employee should have counsel as a matter of right, but at his own expense.²⁶

With respect to the thorny and much debated issue of confrontation, the Commission takes a middle ground between full confrontation in all cases on the one hand, and *ex parte* dismissals with no hearings on the other.²⁷ The Commission recommends that confrontation should not be allowed in the case of regularly established confidential informants engaged in obtaining intelligence and security information for the Government, if the head of the investigative agency involved determines that the disclosure of the identity of such informants would prejudice the national security. In such cases, however, the employee will be given the substance of the information furnished by the informant and this will be read into the record together with an evaluation as to the reliability of the informant, made by the investigative agency. The employee may then file written exceptions or challenges to the informant's statements; and further investigation of the matter may then be requested by the hearing examiner. Except in the case of such regularly established confidential informants derogatory information supplied by informants, whether confidential or identified, will not be considered over the employee's objection, unless the employee is given an opportunity to obtain their testimony either orally or by written interrogatories. The Commission has thus attempted to maintain the balance between protection of the national security and the safeguarding of individual rights. Investigators may argue that informants, whether regularly established or not, will be reluctant to talk unless assured of anonymity, and that the Commission's proposal would tend to "dry up the sources of information." A short answer to this argument is that under the Commission's proposal an investigative agency might still protect its informants; for all that the Commission recommends is that if the identity of a casual informant is not disclosed, so that the employee has no opportunity for confrontation, then the statements of the informant should not be used as evidence against the employee. It would seem, therefore, that the solution to the problem of confrontation recommended by the Commission is sound and fair, both for the Government and the employee.

As a corollary to its proposal with respect to the right of confrontation, the Commission recommends that hearing examiners should be authorized to issue subpoenas, on application by the Government or the employee involved. In the case of witnesses subpoenaed at the request of the employee, the Commission would require him to deposit sufficient funds to pay the travel and per diem expenses of the witness. If the

²⁶ REPORT, 65.

²⁷ REPORT, 66-69; 657-664.

employee were cleared, the expenses of witnesses would be refunded to him by the Government; otherwise, they would be charged to the employee.²⁸ Although subpoenas may now be issued by the Atomic Energy Commission to require the attendance of witnesses at personnel security hearings,²⁹ no other agency has had this power in the past. It seems rather obvious that an opportunity to present a defense should include some machinery whereby an employee can compel the attendance of witnesses. At the same time, the provision for the deposit of costs by the employee would discourage improvident applications for subpoenas and applications made for the purpose of harassment or as part of a fishing expedition.

One other important recommendation of the Commission should be mentioned. The Commission recommends "that the same principle which ordained the necessity of hearings and appeals in employee cases should apply to applicants as well."³⁰ Specifically, while recognizing that no person has a right to employment in the Government,³¹ the Commission recommends that applicants who are rejected on loyalty grounds be accorded hearings and the right to appeal, with all the procedural safeguards extended to employees. The reasoning is that applicants should be given an opportunity to explain derogatory information, and that rejection upon loyalty grounds places a stigma upon an applicant. Although the matter of applicant hearings has been the subject of much discussion in the past, the Commission, somewhat curiously, devotes only a few paragraphs to the question. Perhaps the reason for this rather cursory treatment is that in practical application the matter would become academic; for if the rejection of an applicant upon loyalty grounds would result in a hearing, with at least partial disclosure to the applicant of the material concerning him in the possession of investigative agencies, few security officers or agency heads would reject an applicant upon loyalty grounds.

IV

The procedures of the security system have been developed within the past decade. Some machinery has been improvised, some has been borrowed and adapted from administrative and judicial proceedings. It is not surprising in view of the rapidity with which this procedural

²⁸ REPORT, 69.

²⁹ See Atomic Energy Act, 42 U.S.C. §1812 (a) (1), (3) (1952). Several witnesses appeared pursuant to subpoenas before the Personnel Security Board hearing the case of J. Robert Oppenheimer. See Transcript of Hearing Before Personnel Security Board in the Matter of J. Robert Oppenheimer (U. S. Government Printing Office, 1954, pp. 743, 833).

³⁰ REPORT, 51-52.

³¹ Cf. Holmes, J. in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

mechanism has evolved that occasional malfunctions should have occurred. The work of the Commission on Government Security represents a sincere and thoughtful attempt, after exhaustive study, to reduce such malfunctions to a minimum. The Commission's ultimate objective, of course, is to devise a method of getting at the truth, with the least possibility of error and the greatest possible protection to both the Government and its employees. While some may disagree with details of the Commission's recommendations, no fair-minded person can deny that the report is a great step towards the establishment of a fair and workable security system.